



Utility Legal Issues Update

Alaska Power Association
2018 Annual Meeting

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Topics

- Mandatory Pets at Work Update
- Lending to Members
- Cybersecurity & Website Accessibility
- Taxation of Utilities
- Governance
- Easements
- In the Land of the Midnight Sun, It's Always 4:20
- #MeToo
- Independent Contractors
- Regulatory Update
- Legal or Illegal

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Mandatory Pets at Work Update

- WSJ August 8, 2018 –
- “On U.S. Planes, the Dogs Are Winning”
 - Noted that efforts by airlines to clamp down on abuse of emotional support animal rules have largely failed



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Mandatory Pets at Work Update

- In June, a “service dog” gave birth to puppies in the middle of the Tampa Bay International Airport just before they were scheduled to board an American Airlines flight
- Airlines begging DOT to change the rules to be more like the Americans with Disabilities Act



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Lending to Members

- Alaska electric cooperatives can now do on-bill financing for members
 - Watch out for federal laws
 - Truth in Lending Act (more than 25 loans per year)
 - But only 5 if your loan is "secured" by a dwelling
 - Is our Alaska on-bill financing "secured by a dwelling?"
 - Unfair Trade Practices Act
 - Have to be clear and fair
 - Disclose everything in writing

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Cybersecurity

- Anchorage Daily News
 - July 31, 2018 – Mat-Su Borough computers, servers and phones brought down by cyberattack
 - Estimated three weeks to recover
 - Borough had cyber-insurance
 - City of Valdez hit the week before
- How many states have data breach laws?

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Cybersecurity

- Alaska Data Breach law has been in place since 2009
- Covers all private businesses and government agencies
- Information protected is a combination of an individual's name and
 - Social security number; or
 - Driver's license; or
 - Account number, credit card number, or debit card number;
 - But if personal code required, only is personal code is taken too
 - Passwords, personal identification numbers, or other access codes for financial accounts.

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Cybersecurity

- If you have a breach you must notify customers and take reasonable steps to restore system integrity
 - Option to notify AG and not consumers if no reasonable likelihood of harm from breach
 - Can delay notice at request of law enforcement
 - If individual notice would cost more than \$150,000 or you don't have sufficient contact information for customers, you can provide notice by e-mail, website and statewide media

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Website Accessibility

- In late December 2017, the Department of Justice formally withdrew its 2010 Advance Notice of Proposed Rule Making regarding website accessibility under the Americans with Disabilities Act
 - DOJ evaluating whether regulations about accessibility of web information and services is necessary and appropriate

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Taxation of Utilities – Municipalities

- In 2015, State of Alaska imposed a “refined fuel surcharge” of \$0.01 per gallon on all fuel users, including all utilities in the state
 - State eventually agreed that cooperatives were exempt but refused to exempt municipalities
- Under AS 29.71.030, a municipality is not subject to tax unless “the law or regulation expressly provides that the municipality is to be assessed or taxed by the particular law or regulation.”
 - On July 24, 2018, ALJ agreed that municipalities are exempt
 - State still has time to appeal

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Governance

- NRECA/CFC Task Force Report
- Cooperatives in the news
- Are you comfortable with?
 - Meeting fees
 - Travel limits
 - Insurance coverage
 - Overall costs



POLITICS & GOVERNMENT

High pay and expensive perks: Has 'absolute power' corrupted SC electric co-ops?

BY AVERY G. WILKS
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August 09, 2010 05:13 PM
Updated August 11, 2010 12:18 PM

COLUMBIA, SC — During the early 2000s, part-time board members at Santee Electric Cooperative doubled their pay for each meeting they attended to \$450, held "wasteful" meetings to collect more pay from customers and awarded themselves cash bonuses each year, according to an October 2010 audit.

The Kingstree-based co-op spent nearly \$342,000 in one year — far above the national average — to send its full nine-member board to out-of-town events and conferences, with some trustees taking their spouses along at the co-op's expense.

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Easements

- Broadband
 - Very much in the spotlight nationwide for two reasons:
 - Electric cooperatives helping to bring broadband internet to underserved members, particularly where IOU telecom companies have little interest in serving
 - Missouri Barfield v. Sho-Me Power Elec. Coop.
 - Originally jury awarded \$79 million for trespass
 - Appellate court reversed
 - New jury awarded \$129,000,000 in actual damages plus \$1,300,000 in punitive damages
 - Liability established, but judge ordered a new trial on damages

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Easements

- **Broadband**
 - Tennessee enacted a new law that says any easement or right to use property for electric service includes the right to use it for telecommunications purposes
 - Applies to the cooperative itself or other entities

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Easements

- **Fires**
 - A diseased tree about 50 feet outside the electric utility easement fell during strong winds and hit a distribution line
 - Caused a fire that burned property belonging to other landowners in the area.
 - Is the electric utility liable for the damages caused by the fire?

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Easements

- Fires
 - Significant new federal statute and new regulations coming regarding vegetation management on federal lands
 - Expect additional guidance from Interior and Agriculture regarding vegetation management
 - Ability for small systems like those found in Alaska to enter agreements with federal government in lieu of a vegetation management plan

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Easements

- Fires
 - Significant new statute and new regulations coming regarding vegetation management on federal lands
 - Right to trim hazard trees on federal lands that present an immediate danger but must notify immediately
 - Defines hazard tree – dead, diseased or ten feet away
 - “Limits” strict liability to the feds to \$500,000 per incident

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Easements

- Fires
 - In July, California state appellate court upheld dismissal of punitive damages claim against Pacific Gas & Electric for a wildfire caused by a tree contacting a power line
 - Punitive damages are punishment damages above and beyond the actual damages

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In the Land of the Midnight Sun, It's Always 4:20

- Still just getting started
 - Most marijuana licenses are less than a year old
 - MCB approved 168 licenses in 2017
 - Approved 116 in first eight months of 2018
 - 445 more in process
 - Marijuana business owners say typical customer is 50s or older
 - Supply is catching up with demand, we went from 29 growers in 2017 to 90 in 2018
 - Since 2016, \$100 million spent at legal pot shops in Alaska

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In the Land of the Midnight Sun, It's Always 4:20

- Mainstreaming of marijuana continues
 - ESPN 8/1/17 – NFL offers to work with NFLPA to study potential of marijuana as a pain management tool
 - Northern Michigan University offers a bachelor of science degree in “medicinal plant chemistry”
 - On February 1, 2018, Maine became the first jurisdiction in the United States to protect employees from adverse action based on use of marijuana away from the workplace
 - Does allow discipline if employee “under the influence” at work
- Despite AG Jeff Sessions disavowal of the Cole Memo, no signs of increased federal law enforcement in Alaska

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In the Land of the Midnight Sun, It's Always 4:20

- WSJ Reported on 5/8/18 that Quest Diagnostics analyzed 10 million urine tests conducted for employers and found that while prescription painkillers are down, cocaine, methamphetamine and marijuana use surged
 - 4.2% of applicants tested positive
 - Safety sensitive positions 2.1%, rest of the work force 5%
 - 17% drop in opiates from 2016
 - Positive marijuana tests in Nevada where marijuana became legal in January 2017 was up 43%
 - Interactive Map at <http://www.dtidrugmap.com>

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In the Land of the Midnight Sun, It's Always 4:20

- The final sign of the end times:
 - ADN 3/21/18 – Cannabis for dogs? A look behind CBD pet treat trend
 - Notes that unlike THC, CBD (cannabidiol) does not get the user high and is non-intoxicating



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In the Land of the Midnight Sun, It's Always 4:20

- Under the influence in labor relations
 - In 2017, five prominent labor arbitrators reviewed a case where grievant was discharged after testing positive for marijuana
 - Worked in a non-safety sensitive position
 - Policy clear and union does not challenge test result showing 1,000 ng/ml
 - MRO testified this was sufficient proof of impairment
 - How many of the five arbitrators would have upheld a discharge?

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In the Land of the Midnight Sun, It's Always 4:20

- Under the influence in labor relations
 - All five arbitrators said they would reverse the discharge
 - Marijuana can stay in the system for 30 days, it is not like alcohol, testing positive does not indicate impairment
 - One arbitrator noted a study tending to show that police officers could only accurately detect marijuana impairment about half the time

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#MeToo

- New attention to harassment complaints
 - Microsoft taken to task for finding harassment in only 1 of 118 complaints received from female employees
 - Came up in lawsuit by female former employees claiming company routinely held women back by denying raises and promotions
 - Uber HR chief pushed out after probe of how discrimination claims were handled
 - Chronicle of Higher Education reported recently on an uproar that started with a male professor asking to have the elevator button pressed for "women's lingerie" on an elevator

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#MeToo

- July 17 EMPOWER Act co-sponsored by Sen. Lisa Murkowski
 - Illegal to include new or enforce existing non-disparagement or non-disclosure clauses that cover harassment or retaliation
 - Only illegal if made condition of employment or receiving promotion or other benefits
 - Would not apply to settlement agreements or separation agreements
 - Applies to independent contractors and job applicants, not just employees

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#MeToo

- July 17 EMPOWER Act co-sponsored by Sen. Lisa Murkowski
 - Federal confidential tip line
 - EEOC could investigate EMPOWER violations
 - Public companies would have to disclose harassment settlements (any company filing SEC 10-K)
 - Number of settlements
 - Judgments and arbitration awards
 - Amount paid
 - EEOC would develop training materials

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#MeToo

- July 17 EMPOWER Act co-sponsored by Sen. Lisa Murkowski
 - No tax deduction for expenses and attorney's fees connected to litigation of workplace harassment
 - No tax deduction for payments under judgments related to harassments
 - Amounts received through settlement or award of harassment claims would be nontaxable income

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#MeToo

- Make sure policy is up to date and that you can prove every employee has seen it
- Make sure you regularly train employees on the policy
- Follow the policy and conduct appropriate investigation of alleged violations
- Make sure senior leadership foster an environment of respect and professionalism
 - Including the Board of Directors

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Independent Contractors

- Good news: new federal Department of Labor guidance
 - Previously DOL withdrew the Obama era guidance on classifying independent contractors vs. employees
 - That guidance said control over the worker didn't matter and that "most workers are employees" under the FLSA
 - No formal guidance on how DOL now views this issue
 - July 2018 bulletin on nurses says DOL will evaluate the "totality of the circumstances"
 - This is the historical approach, with emphasis on control of the worker, but no single factor will determine the relationship

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Independent Contractors

- Bad news: new Alaska worker's comp rules require all of the following to be true to be an independent contractor:
 - Express contract
 - Free from direction and control over the means and manner of providing services, subject only:
 - to the right . . . to specify the desired results, completion schedule, or range of work hours, or to monitor the work for compliance with contract plans and specifications, or federal, state, or municipal law;
 - Incurs most of the expenses for tools, labor, and other operational costs necessary to perform the services, except that materials and equipment may be supplied

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Independent Contractors

- **Bad news: new Alaska worker's comp rules**
 - Has an opportunity for profit and loss
 - Is free to hire and fire employees to help
 - Has all business, trade, or professional licenses
 - Follows IRS rules:
 - Employer tax ID if required
 - File business/self-employment tax returns for prior year or current year if business was not operating previous year

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Independent Contractors

- **Bad news: new Alaska worker's comp rules**
 - **Must meet at least two of the following criteria:**
 - Liable for completing work and has insurance to protect the business
 - Has a business location or a business mailing address separate from the location of the individual for whom, or the entity for which, the services are performed;
 - Provides services for two or more different customers within a 12-month period or advertise/market reasonably calculated to obtain new contracts to provide similar services.

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Independent Contractors

- **Bad news: new Alaska worker's comp rules**
 - You are most likely to find out someone is not properly an independent contractor after that person has been injured
 - The costs to an employer of not insuring a person who is misclassified as an independent contractor are staggering, especially if the person is seriously injured or killed
 - You can't contract around misclassification because the state will still hold you responsible even if your contract requires
 - Bottom line: don't classify as independent contractor unless you are 100% the person you're contracting with meets these criteria

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Regulatory Update

- Under PURPA, QFs are cogeneration or small power production facilities (less than 80 MW) that generate with renewables or other nontraditional fuels
 - QFs are entitled to interconnection with electric utilities
 - Public utilities required to purchase ANY power the QF generates and offers to sell to the public utility
 - RCA has jurisdiction over QF disputes with economically regulated utilities

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Regulatory Update

- For purchases of energy by the utility, the rates under the tariff must be:
 - based on the avoided costs; 3 AAC 50.770(d)
 - “just and reasonable”; and
 - In the public interest.
- Rates must NOT:
 - Discriminate against QFs; or
 - Adversely affect the consumers of the utility

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GVEA and Delta Wind Farm, Inc.

- GVEA argued that integrating DWF’s project would severely disadvantage its members based on then current operational circumstances
- RCA determined based on the record:
 - Prior to the operation of GVEA’s Healy 2 plant, DWF would have to sell its power for $-\$0.16$, and
 - After Healy 2 is in operation it would be $-\$0.64$
- Under these circumstances “GVEA’s ratepayers would not be economically indifferent; they would be disadvantaged.” Order No. U-17-053(8) at 17.

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GVEA and Delta Wind Farm, Inc.

- GVEA's proposal to allow DWF to purchase power at the same rates as sales to other customers, without a facility-specific tariff, was reasonable
- Huge win for the utility's members
- Emphasizes the importance of calculating the true cost of adding variable power sources like wind and solar when determining the correct rate to be paid for power purchases

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Chugach Electric and CIRI Wind

- Chugach and CIRI Wind were arguing over how the costs for a withdrawn OF interconnection request should be handled
- Chugach went to RCA and CIRI Wind claimed RCA had no jurisdiction over it
- RCA held that entities that qualify for renewable producers may still be public utilities subject to RCA jurisdiction for disputes related to joint use and interconnection of facilities, even if exempt from economic regulation

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Chugach Electric and CIRI Wind

- But what about recovery of costs for a withdrawn application?
 - RCA punted and left the issue open because Chugach never sent CIRI Wind a bill

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Legal or Illegal

- Boeing case involved a work rule that prohibited the use of camera-enabled devices such as cell phones
 - Legal or Illegal?

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Legal or Illegal

- For almost 15 years, we've been working under The Lutheran Heritage test:
 - No consideration of legitimate employer justifications or balancing of employer vs. employee interests
- Boeing reigned in some of the ridiculous rulings from the NLRB regarding work rules
 - "Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain"

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Legal or Illegal

- New standard looks at:
 - Nature and extent of the potential impact on NLRA rights and
 - Legitimate justifications associated with the rule

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Legal or Illegal

- Rules that are lawful because
 - The rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights or
 - the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Examples:
 - the no-camera requirement
 - “harmonious interactions and relationships” rules
 - Other rules requiring employees to abide by basic standards of civility.

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Legal or Illegal

- Rules that are illegal because:
 - They would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule
- Examples:
 - Rule that prohibits employees from discussing wages or benefits with one another

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Legal or Illegal

- Under Boeing, important to remember that even a lawful rule can be applied in an unlawful manner to an employee exercising Section 7 NLRA rights

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Legal or Illegal

- Lowe's enacted policy prohibiting employees from discussing confidential salary information
 - Legal or Illegal?

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Legal or Illegal

- Employee wrote the words “whore board” on a sheet where employees could sign up to work overtime
 - Claimed he was protesting unilateral employer change to overtime scheduling
 - Employer fired the employee
 - Legal or Illegal?

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Legal or Illegal

- Funeral home has gender-specific dress code
- Male employee announced that when he returned from vacation, he would begin living and working as a woman
- Employer fired before she left on vacation
- Legal or illegal?

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Legal or Illegal

- EEOC found that this was discrimination based on sex
- Filed charges in federal court
- Sixth Circuit Court of Appeals found that:
 - Employee was terminated for failing to comply with sex stereotypes in violation of Title VII
 - Said you cannot terminate for transgender status without it being based on sex
 - Analogized to firing an employee for converting from Judaism to Christianity

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Legal or Illegal

- General manager called a staff meeting to critique staff performance
- Asked employees for feedback on how they could do better
- GM set the tone for the meeting by stating "he didn't want to come to work to be anybody's f*cking babysitter."
- An employee responded, "how do you know, you don't do sh*t around here."
- GM terminated the employee after the meeting
- Legal or Illegal?

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Legal or Illegal

- NLRB administrative law judge found:
 - Comment was not the start of a meaningful dialogue about terms and conditions of employment
 - Found statement was calculated to undermine GM's authority, not concerted attempt to address work conditions

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Want to Learn More?

- Many more topics we did not have time for:
 - Governance litigation
 - NRECA/CFC Corporate Governance Task Force Report
 - More labor and employment updates
 - Alaska Supreme Court decision on terminating employees for threats of violence
 - Capital credits
- For more, plan on attending the May 2019 APA Management Legal Workshop

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The End

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